SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 15

THE UNITED STATES OF AMERICA,
Appellant,

vs.

PAUL EVANS

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

DAVID GINSBURG,
Counsel for Appellee.

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Opinion Below

The District Court prepared no opinion. The grounds of its decision are stated in its order granting the motion to dismiss the indictment (R. 10).

Jurisdiction

The order of the District Court granting the motion to dismiss the indictment was entered October 10, 1946 (R. 10). Notice of appeal by the United States was filed with this Court on November 8, 1946 (R. 10-11), and probable jurisdiction noted on January 20, 1947 (R. 15). The jurisdiction of this Court is invoked under the Act of March 2,

1907, c. 2564, 34 Stat. 1246, as amended by Section 1 of the Act of May 9, 1942, c. 295, 56 Stat. 271, 18 U. S. C., Supp. V, 682 (Criminal Appeals Act), and under Section 238 of the Judicial Code, as amended, 28 U. S. C. 345.

Question Presented

Whether Section 8 of the Immigration Act of 1917 provides a penalty for concealing or harboring aliens not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States.

Statute Involved

Section 8 of the Immigration Act of 1917, c. 29, 39 Stat. 880, 8 U. S. C. 144, provides:

> Any person, including the master, agent, owner, or consignee of any vessel, who shall bring into or land in the United States, by vessel or otherwise, or shall attempt, by himself or through another, to bring into or land in the United States, by vessel or otherwise, or shall conceal or harbor or attempt to conceal or harbor, or assist or abet another to conceal or harbor in any place, including any building, vessel, railway car, conveyance, or vehicle, any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States under the terms of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $2,000 and by imprisonment for a term not exceeding five years, for each and every alien so landed or brought in or attempted to be landed or brought in.

Statement

Paul Evans, appellee, and Joe V. Roberts were indicted on September 4, 1946, in the District Court for the Southern District of California and charged with having violated Sec-

tion 8 of the Immigration Act of 1917. Specifically, the grand jury charged that on or about June 22, 1946, in Riverside County, California, the two defendants "did conceal and harbor and attempt to conceal and harbor" five named aliens, who the defendants knew had not been duly admitted to the United States by an immigrant inspector and were not lawfully entitled to enter or to reside in the United States (R. 1). Whether the five named aliens had been unlawfully "landed" or "brought in" the country, or whether they had entered in some other manner is not revealed in the charge or the record. On October 10, 1946, Evans moved that the indictment be dismissed on the ground that the court was without jurisdiction to impose any punishment since the indictment did not state facts sufficient to constitute a punishment offense against the United States (R. 2). On the same day, after argument, Judge Hall granted the motion to dismiss "on the grounds that the statute does not provide a penalty for harboring and concealing, which is the only thing charged in the indictment" (R. 10).

Summary of Argument

Section 8 of the Immigration Act of 1917 describes the concealing or harboring of aliens as well as landing or bringing them in as misdemeanors. The penalty clause, however, provides punishment by fine not exceeding $2000 and by imprisonment not exceeding five years *for each and every alien so landed or brought in or attempted to be landed or brought in.* Because the penalty clause is clearly limited to landing or bringing in, the court below ruled that section 8 provides no penalty for concealing and harboring. Appellee submits that this decision is correct, supported not only by the quoted language of the statute but by its history.

The history of section 8—not developed in the Government's brief—shows that this very problem had been anticipated by the Commissioner General of Immigration in 1909; that before section 8 was amended in 1917 he had repeatedly suggested language which would have covered the present case; that the Congress considered his recommendations but did not accept those relating to the penalty clause; and that the act of which section 8 is a part was drawn with care and fully debated by the Congress. The Government thus actively sought a law which covered the point here involved but failed to secure such a law.

Thereafter the Government pressed for its construction before the lower courts, but failed to secure unanimity of opinion (four district judges, in all, have held that section 8 provides no penalties for concealing or harboring; two district judges have taken a contrary view). When a circuit court decision was obtained only partially in its favor the Government opposed review here. After the Commissioner General concluded that an amendment to section 8 was necessary, and after he had twice recommended such legislation in his annual reports, the Government returned to the Congress but failed to persuade it to act. Later the Government pressed for partially corrective legislation in a different area and managed to secure it. Now, before this court, the Government repudiates its former position in the circuit court case; vigorously contends that the interpretation of the court below is too strict, and concludes that there is "no doubt" regarding the Congressional intent to penalize concealing or harboring.

In fact the Government seems to be seeking from the court an amendment which thus far it has been unable to secure from the Congress. That conclusion is strengthened by a choice of three interpretations of section 8 which the Government appears to have offered the court, any one of which the Government apparently feels would satisfy a

Congressional intention repeatedly described as clear. Appellee suggests that the determination of policy in the selection of one from among several competing and widely different penalty clauses, in order to amend the present form of the statute, cannot fairly be regarded as a judicial function.

ARGUMENT

The Indictment Fails to Charge a Punishable Offense Since Section 8 of the Immigration Act of 1917 Does Not Prescribe a Penalty for Concealing or Harboring Aliens.

Appellee is charged with having knowingly concealed and harbored five aliens who had entered the United States unlawfully. Appellee is not charged with having brought in or landed those aliens. Nor is it even known whether those aliens were landed or brought in—smuggled in—or entered in some other manner. Concealing or harboring aliens as well as landing or bringing them in are described in Section 8 of the Immigration Act of 1917 as misdemeanors. But the penalty clause of section 8 is explicitly narrower than the two classes of offenses described. It provides punishment by a fine not exceeding $2,000 and by imprisonment for a term not exceeding five years, *for each and every alien so landed or brought in or attempted to be landed or brought in.*

In part the Government asserts, notwithstanding this language, that, properly construed, section 8 provides the same maximum penalty for both classes of offenses. Since it is charged that five aliens are involved the maximum penalty, under this view, would be a fine of $10,000 and 25 years imprisonment. Section 8 makes it mandatory that violations be punished by both fine and imprisonment. The Government also suggests, however, that if this court employs what it describes as a "strictly grammatical construction of section 8" then the maximum penalty would

be reduced to $2,000 and 5 years imprisonment. (Government's brief, page 18.) Still a third possible interpretation offered by the Government is considered below (pp. 23-24).

It is the position of the appellee that section 8 does provide a penalty for unlawfully landing or bringing in aliens but does not provide a penalty for concealing or harboring them and that this is true whether the reading of the statute is strictly grammatical or otherwise.

A. Plain Language of Section 8

The words of section 8 are unambiguous. Fine and imprisonment are to be imposed "for each and every alien so landed or brought in or attempted to be landed or brought in." Section 8 does not impose a penalty "for each and every alien so concealed or harbored." Neither does it impose a penalty for attempting to conceal or harbor, nor for assisting or abetting another to conceal or harbor—although all of these acts, like concealing and harboring, are referred to in the body of the section. The Government thus asks this court to read into the statute by interpretation what the Congress, advertently or inadvertently, omitted in enactment. The argument apparently is that unless the omission is remedied by the court, the offenses of concealing and harboring will go unpunished, contrary to Congressional intent, until the statutory defect is remedied by the Congress through amendment.

This is not a case in which the Court is asked to construe an imprecise word or phrase to determine its applicability to varying sets of facts. *United States* v. *Raynor*, 302 U. S. 540. The Government does not seek to extend the phrase "landed or brought in" to include "concealed or harbored"; it rather asks the Court to disregard limits established by the Congress, in a penal statute, because of an assumed Congressional purpose to do more than the words indicate. In the past the Court has refused to

carry the interpretative process so far. *Isclin* v. *United States*, 270 U. S. 245.

The dangers of cutting adrift too quickly from the language of a statute are illustrated by this case. In the history of section 8, if not strictly in its words, the Government purports to find conclusive evidence of a Congressional intention to penalize as offenses the concealing or harboring of aliens. Appellee will examine that evidence and amplify the abridged presentation of it set forth in the Government's brief.

B. Initial Proposals by the Government, 1909-1911

As passed in 1907 and until its amendment in 1917 section 8 contained no reference to the concealing or harboring of aliens but was concerned solely with the offense of landing them or bringing them in. The text of the original provision follows:

> Sec. 8. That any person, including the master, agent, owner, or consignee of any vessel, who shall bring into or land in the United States, by vessel or otherwise, or who shall attempt, by himself or through another, to bring into or land in the United States, by vessel or otherwise, any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter the United States shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine not exceeding one thousand dollars, or by imprisonment for a term not exceeding two years, or by both such fine and imprisonment for each and every alien so landed or brought in or attempted to be landed or brought in. (Immigration Act of 1907, c. 1134, 34 Stat. 900.)

In 1917 section 8 took its present form, but so far as appellee has been able to ascertain the first reference to the concealing or harboring of aliens is contained in the Annual Report for 1909 of the Commissioner General of Immigration. That report includes a complete review of the immigration laws as they then existed together with a

proposed new immigration law (page 153). Section 32 of the Commissioner General's new bill (page 168) is the predecessor of section 8 as it comes before the Court today. The text of section 32 follows:

> Sec. 32. That any person, including the master, agent, owner or consignee of any vessel, who shall bring into or land in the United States, by vessel or otherwise, or who shall attempt, by himself or through another, to bring into or land in the United States, by vessel or otherwise, or *who shall conceal or harbor, or attempt to conceal or harbor, or assist or abet another to conceal or harbor in any building, vessel, railway car, or other place, conveyance, or vehicle*, any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States under the terms of this Act shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine of not less than five hundred nor more than three thousand dollars, or by imprisonment for a term of not less than one year nor more than three years, or by both such fine and imprisonment *for each and every alien so landed or brought in or attempted to be landed or brought in, or so concealed or harbored, or with respect to whom there has been such an attempt to conceal or harbor, or assisting or abetting another to conceal or harbor*. Every vessel, boat, railway car, or other vehicle or conveyance of whatever description, the master, owner, lessee, or bailee of which shall use the same in violating any of the provisions of this Act shall be deemed forfeited to the United States and shall be liable to seizure and condemnation in any district of the United States into which such vessel, boat, railway car, or other vehicle may enter or in which it may be found (Italics supplied).[1]

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[1] The explanatory memorandum accompanying the proposed draft contains this paragraph (p. 183, Commissioner General's report):

"Section 32. In this, which is a modification of section 8 of the Act of 1907, as in the other penal provisions of the draft, an effort has

It is evident that the Commissioner General anticipated the problems involved in this case. The penalty clause of section 32, as it was originally recommended to the Congress, clearly covered concealing or harboring aliens as well as landing or bringing them in.

The proposed new immigration law was republished in the Commissioner General's Annual Report for 1910 "with modifications to make it include all of the Bureau's recommendations of last year and this" (page 3). The explanatory notes are unchanged, but the text of section 32 is abbreviated. Instead of the phrase "for each and every alien so landed or brought in or attempted to be landed or brought in, or so concealed or harbored, or with respect to whom there has been such an attempt to conceal or harbor, or assisting or abetting another to conceal or harbor", there is substituted the simple statement "for each and every alien to whom this section is applicable." These words would likewise have insured the applicability of the penalty clause to the offenses of concealing or harboring.

The proposed new immigration law was again republished in the Commissioner General's Annual Report for 1911. This time section 32, both the text and the explanation, remained unchanged from the version in the 1910 Report.

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been made to fix upon a reasonable, and yet sufficient, *minimum* and *maximum* penalty. In some localities, there is so little sympathy with the laws dealing with aliens that violators sometimes receive sentences altogether inadequate to the offense. This should be prevented, and the best way is to fix the minimum as well as the maximum limit of the penalty. The attempt has also been made to so word this and all the penal provisions as to make them operative despite the tendency of the courts to adhere to perhaps unduly strict rules of construction in criminal and penal matters. That is very important in this section, as it covers the smuggling of Chinese as well as of other aliens, and the smuggling of Chinese is an exceedingly lucrative business, affording great temptation, to those criminally disposed. Hence also the provision for the confiscation of vessels and vehicles used in smuggling."

C. Congressional Consideration, 1911-1917

On August 7, 1911, a bill was introduced by Mr. Dillingham in the Senate which incorporated many of the Commissioner General's suggestions (S. 3175, 62d Cong. 2d sess.). On January 18, 1912, the bill was favorably reported by the Senate Committee on Immigration (S. Rep. No. 208 on S. 3175, 62d Cong., 2d Sess.). Concealing and harboring of aliens are described as misdemeanors in the bill but contrary to the repeated recommendations of the Commissioner General, the penalty clause offered by Senator Dillingham and accepted in the Committee Report refers only to the landing or bringing in of aliens.

This seems to be the origin of what the appellant regards as a Congressional error or omission. The text of section 8 as contained in S. 3175 follows:

> "Sec. 8. That any person, including the master, agent, owner, or consignee of any vessel, *who shall bring into or land in the United States, by vessel or otherwise, or shall attempt, by himself or through another, to bring into or land in the United States, by vessel or otherwise, or shall conceal or harbor, or attempt to conceal or harbor, or assist or abet another to conceal or harbor in any place*, including any building, vessel, railway car, conveyance, or vehicle, any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine not exceeding one thousand dollars, or by imprisonment for a term not exceeding two years, or by both such fine and imprisonment *for each and every alien so landed or brought in or attempted to be landed or brought in.*" (Italics supplied.)

In drafting this provision it is a fair inference from the language alone that Senator Dillingham and his colleagues relied on the suggestions made by the Commissioner Gen-

eral in his Annual Reports for 1909, 1910 and 1911; except for the alteration in the penalty clause, the offense of concealing and harboring is defined in almost the same words as were used by the Commissioner General in section 32 of his proposed new law.

S. 3175 was passed unchanged by the Senate on April 15, 1912; introduced in the House and referred to the House Committee on Immigration and Naturalization on April 20, 1912, and, after hearings, reported by the Committee with drastic amendments on June 7, 1912 (H. Rep. No. 851 on S. 3175, 62d Cong., 2d sess.). The life of the Congress ended, however, before the bill was considered by the Committee of the Whole.

Substantially the same bill was reintroduced by Mr. Burnett as H. R. 6060 at the 1st session of the 63d Congress on June 13, 1913. Section 8 of H. R. 6060 was in exactly the same form as section 8 in S. 3175. The bill was favorably reported by the House Committee on Immigration and Naturalization (H. Rep. No. 140 on H. R. 6060, 63d Cong., 2d sess.) and passed by the House on February 4, 1914. It was then introduced in the Senate, favorably reported by the Senate Committee on Immigration (S. Rep. No. 355 on H. R. 6060, 63d Cong., 2d sess.), and passed by the Senate, without change, on January 2, 1915.

The Senate Report (page 2) pictures the careful consideration which had been given the legislation:

> "In this act, moreover, special attention and thought have been given to administrative details. The 'machinery' for the effective enforcement of the law has been made as nearly as possible perfect in every particular. To attain this end most thorough consideration has been given the subject, the reports of the Immigration Commission have been consulted, and *recommendations and suggestions submitted by the Secretary of Labor and by the Commissioner General of Immigration from time to time have been adopted*

wherever possible; moreover, officers of experience in the practical administration of the laws heretofore passed have been freely and fully conferred with. Indeed, it may be said that in its administrative features this bill embodies the results of a practical experience of a quarter of a century in the 'regulation of immigration.' . . . Most of the time your committee has given to the bill has been devoted to its careful review with the object of improving its wording wherever possible, and in perfecting of a few points its selective and administrative features. . . . As now reported, it is confidently believed the measure is as nearly ideal in its selective, administrative, and restrictive features as it is possible to make such a law in advance of experience with the operation of such of its provisions as are actually new." (Italics supplied.)

With specific reference to section 8, the Report contains this paragraph:

"Section 8. *Description.*—This is based upon section 8 of the existing law, and such new provisions as are included are merely to complete the definition of the crime of smuggling aliens into the United States and related offenses and to meet the various court decisions showing that the present law is not sufficiently explicit."

Although passed by both Houses, H. R. 6060 did not become law. It was vetoed by President Wilson and the Congress acquiesced in the veto. The bill was disapproved for reasons that had nothing to do with section 8.

At the next Congress, the 1st session of the 64th, the bill was once more introduced, this time as H. R. 10384. It was in this version that section 8 reached its present form. The bill was favorably reported by the House Committee on Immigration and Naturalization on January 31, 1916 (H. Rep. No. 95 on H. R. 10384, 64th Cong., 1st sess.) and passed by the House on April 8, 1916. It was introduced in the Senate on April 10, 1916, favorably reported on April

12, with additional amendments on May 18 (S. Rep. No. 352 on H. R. 10384, 64th Cong., 1st sess.), and passed by the Senate on December 13, 1916. During the entire process section 8 remained unaltered. The only specific comment regarding section 8 is contained in the Senate Report, which reprints the same paragraph regarding section 8 as was contained in the S. Rep. No. 355 on H. R. 6060. But the report does reveal (p. 2), for the first time in full detail, the sources utilized in the preparation of the bill:

> "This act is in most respects identical with the measure (H. R. 6060, 63d Cong., 3d sess.) passed at the last session of Congress, but vetoed by the President. . . . This comprehensive codification, amendment, and extension of the immigration laws has gradually been evolved, in the course of the past eight years, from several different sources, and has been before the Senate in more or less complete form on several different occasions. . . . Some of the principal sources from which the act has been derived consist of the immigration law act of February 20, 1907 (34 Stat., 898), as amended by the act of March 26, 1910 (36 Stat., 263); *suggestions submitted at different times in his annual reports by the Commissioner General of Immigration, particularly the drafts of an immigration bill contained in his reports for the fiscal years 1909, 1910 and 1911, covering especially needed improvements in the administrative features of the law;* the bill S. 3175, Sixty-second Congress, second session, and similar bills introduced in Congress as the result of the investigations conducted by the Immigration Commission, and including, in particular, H. R. 6060, to which reference has already been made." (Italics supplied.)

That the Congress gave detailed, indeed exhaustive consideration to this legislation, that it was fully debated, and that the particular provision before the court was itself considered and several times amended, is thus attested by the Congress itself. And that the Congress which enacted the bill in its present form had before

it all of the pertinent material is similarly proved. In particular, the Congress, certainly the committees and the legislative leaders, gave consideration to the recommendations of the Commissioner General. Why the Congress refused to be guided by the Government's recommendations regarding section 8 is not disclosed. There is merely evidence that those recommendations were received and noted, but were not accepted in all respects.

Appellee does not offer these facts as controlling evidence of a Congressional intention not to punish the concealing and harboring of aliens as a separate crime.[2] All of the facts are not known. From the insertion of language regarding concealing and harboring in the body of section 8 an intent to penalize those acts might reasonably be inferred; yet the penalty provisions are clearly confined to landing or bringing in, and the legislative history, at best (from the Government's point of view) is inconclusive. This does not seem to be a proper foundation on which to base an indictment and an argument calling for punishment both by way of fine and imprisonment, in the amount of $10,000 and for a period of 25 years.[3]

D. Judicial Decisions Adverse to Government, 1923-1933

The judicial history of section 8 is largely confined to the District Courts of the Southern District of California and begins in 1923 with a decision by Judge Trippett in *United States* v. *Niroku Komai*, 286 Fed. 450. Judge Trippett held that section 8 clearly did not prescribe any pen-

[2] The Immigration Act of 1917 contained 39 sections. There were separate penal provisions in more than 20 of them.

[3] The Government recognizes that the failure of the Congress to link penalty and offense may have been an oversight. (Government's brief, p. 12.) Although there is some evidence to the contrary in the legislative history (see also sections D and E below, this must be reckoned with as a reasonable possibility.

It would hardly be contended that an indictment would lie even for landing or bringing in aliens if, through oversight, no penalty clause of

alty for concealing and harboring, but that an indictment would lie under section 37 of the Criminal Code for a conspiracy to conceal and harbor since a conspiracy was a separate offense which carried its own penal provisions.

In 1930 Judge Jacobs in the same district granted a motion in arrest of judgment after a jury had convicted for concealing and harboring. If the Congress had intended to penalize concealing or harboring, he said, it could easily have omitted "for each and every alien so landed or brought in." He recognized that this may have been an oversight on the part of the Congress, but since the penalty was limited to landing and bringing in, he felt that the court was without authority to enlarge or extend its application. *United States* v. *Kinzo Ichiki*, 43 F. 2d 1007.

In 1933, however, the Circuit Court of Appeals for the First Circuit took a somewhat different view. The defendant had been indicted in Pennsylvania for concealing and harboring but the case arose on a habeas corpus proceeding in Massachusetts where the defendant had been arrested prior to removal to Pennsylvania. Judge Bingham so construed section 8 that landing or bringing in would be subject to cumulative penalties, if more than one alien was involved, but concealing and harboring would be subject only to a maximum penalty of $2,000 and 5 years in jail without regard to the number of aliens. *Medeiros* v. *Keville*, 63 F. 2d 187, certiorari denied, 289 U. S. 746. Judge Bingham's interpretation was urged as error in the petition for certiorari filed with this court, but the issuance of the writ was successfully opposed by the Government partly on the ground that the decision was correct

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any kind had been included in section 8. This would appear to be true even if a Congressional intention to punish landing or bringing in were unequivocally clear from the legislative history. If, therefore, through oversight, no penalty is provided for concealing or harboring, it is difficult to see how the powers of the Government are enlarged merely because the government had previously been given the authority to punish landing or bringing in.

on other grounds; partly because no such conflict existed among the circuits as warranted the issuance of the writ, and partly because, it was alleged, the decision below was correct (No. 826, October Term, 1932). The Government's brief in opposition contained this paragraph:

> "While the language of the section, if taken literally, lends some support to petitioner's contention, we think the correct interpretation of the statute is that adopted by the court below."

The Government has evidently reconsidered its position since the *Medeiros* case. In commenting on the refusal of the court in that case to permit cumulative penalties for concealing and harboring, the Government now states:

> "We think this limitation erroneous. The congressional intent to make the punishment proportionate where the violation is concealing or harboring is, we think, equally as clear as the intent to make those offenses punishable at all." (Government's brief, pages 13-14, footnote 7.) [3]

Appellee appreciates the Government's dilemma. Problems arose for the Government under section 8 because the penalty clause was limited to landing or bringing in. The First Circuit sought to avoid the problem by dividing the penalty clause into two parts, the first applicable both to concealing or harboring and to landing or bringing in; the second applicable only to landing or bringing in. Since there is no warrant either in the language or legislative history of the section or in the nature of the offenses which would justify such a distinction, the Government now cites the *Medeiros* case as a favorable decision, yet is compelled to deny the rationale which made that decision possible.

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[3] After the *Medeiros* case there were three decisions holding that penalties are prescribed for concealing and harboring (*United States* v. *Roberts*, decided by Judge Yankwich on April 29, 1946; and *United States* v. *Piamonte* and *United States* v. *Ruiz*, decided by Judge Weinberger on May 21 and 28, 1946, respectively), and two more decisions to the contrary (Judge

E. Unsuccessful Efforts by Government to Secure Amendments to Section 8, 1930-1934

The Government's dilemma would seem to have one clear solution. The defect in the statute, if it is a defect, should be remedied by the Congress through amendment rather than by this court through construction. Efforts to persuade the Congress to amend Section 8 have, indeed, been made.

In 1931, after the *Kinzo Ichiki* case, the Commissioner General of Immigration, in his Annual Report, recommended:

> "That section 8 of the immigration act of 1917 be amended to provide a specific penalty for the offense of harboring and concealing smuggled aliens. This amendment is necessitated by decisions of certain courts that this clause of section 8 is inoperative because Congress did not in clear language specify a penalty for the offense."

In 1932 this recommendation was repeated.

In 1934 the Department of Labor submitted a "five-bill program" to the Congress. H. R. 9366, 73d Cong., 2d sess. contained the Department's recommendation regarding Section 8. The proposed bill amended the last clause of Section 8 to read "for each and every alien in respect to whom any of the foregoing offenses have occurred" (in 1911 the Commissioner General had suggested "for each and every alien to whom this section is applicable"). Regarding the bill Mr. Edward J. Shaughnessy, Deputy Commissioner of Immigration and Naturalization, testified (Hearings before the House Committee on Immigration and Naturalization, 73d Cong., 2d sess., May 8, 9, 10, 1934, page 22):

> "Mr. Shaughnessy. The particular purpose of the amendment is to make sure that there will be no ques-

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Hall's dismissal of the indictment in the instant case on October 10, 1946, followed by Judge McCormick on October 14, 1946, in *United States* v. *Leyra-Rodriguez*).

> tion that we can inflict this penalty for concealing a smuggled alien. The decisions have been somewhat in conflict as to the authority to penalize a person who conceals a smuggled alien. It is clear that we can penalize them for smuggling an alien, but this provides for the case of concealing the smuggled alien."

The Congress did not enact the proposed bill, but the effort to secure additional legislation supplementing Section 8 in its original form did not cease. Stowing away on vessels to facilitate entry in the United States was made unlawful in 1940, and those who aided, abetted, or assisted any stowaway were subjected to fine and imprisonment (Act of June 11, 1940, c. 326, 54 Stat. 306, as amended April 4, 1944, c. 162, 58 Stat. 188). At approximately the same time the immigration law was amended so as to authorize the deportation of any alien who, knowingly and for gain, encouraged, induced, assisted, abetted, or aided another alien to enter or to try to enter the United States in violation of law (Act of June 28, 1940, c. 439, Title II, Section 20, 54 Stat. 671, 8 U. S. C. 155). By new legislation, therefore, the Government has regained part of the ground assumed to have been lost in Section 8.

F. Applicable Principles

Controlling precedents in the field of statutory interpretation are, in the nature of the problem, unavailable. So much depends on the exact words used, the nature of the statute, and the origin and history of the particular legislation that precedents of any kind are rarely helpful. Yet there is one case, at least, in the general field, which although distinguishable on its facts may nevertheless be of interest to the Court. *Iselin* v. *United States*, 270 U. S. 245 called for the construction of paragraph 3 of Section 900(a) of the Revenue Act of 1918. Paragraph 3 imposed a tax on various amusement tickets, including opera tickets, sold otherwise than at the box office at not more than 50¢ in excess of

the "established price." The taxpayer was a stockholder in a corporation that had reserved to it all of the parterre boxes at the Metropolitan Opera, and had received from the corporation certain parterre tickets which she had sold at varying prices. The question thus arose whether there was an "established price" for parterre tickets. The Commissioner sustained a tax on the proceeds of the sale on the theory that parterre boxes were substantially like the "grand tier" (boxes on the next highest level), and that the Congress had clearly intended to tax the proceeds from the sale of all such tickets.

Speaking for a unanimous court Mr. Justice Brandeis rejected the contention that such proceeds were taxable:

> "It may be assumed that Congress did not purpose to exempt from taxation this class of tickets. But the act contains no provision referring to tickets of the character here involved; and there is no general provision in the act under which classes of tickets not enumerated are subjected to a tax. Congress undertook to accomplish its purpose by dealing specifically, and in some respects differently, with different classes of tickets and with tickets of any one class under different situations. The particularization and detail with which the scope of each provision, the amount of the tax thereby imposed, and the incidence of the tax, were specified, preclude an extension of any provision by implication to any other subject. *The statute was evidently drawn with care. Its language is plain and unambiguous. What the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.*" (Italics supplied.)

The *Iselin* case deals with a problem of general applicability in the broad field of statutory interpretation. The

present case, however, is concerned with a penal statute; if one of the Government's proposed readings of the language is correct Evans will be subject to a maximum penalty of $10,000 and 25 years imprisonment.

When the consequences of a court's construction of a statute may be fine and imprisonment it has generally been regarded as right that the court should be more closely guided by the words of the legislature than by any assumed purpose behind the legislation. *United States* v. *Wiltberger*, 5 Wheat. 76; *United States* v. *Resnick*, 299 U. S. 207. Only the legislature in our system of government has the power to provide for such penalties. And when the legislature has failed to act, or has acted inadequately, or incompletely, or when errors have crept into the statute, courts have customarily abstained from the legislative sphere.

The policy seems wise because of the danger that if the words of a statute are abandoned as the medium of communicating decisions of the legislature to the people and to the courts, the purpose of the legislature may be misunderstood, particularly when that purpose has been ill defined or not defined at all. Courts and lawyers, moreover, often do not have access to or utilize the legislative materials and records in which the legislative purpose is usually embodied. In such cases, freedom to go much beyond the words of the law may easily become freedom to substitute a personal judgment for the legislative purpose. Finally, it has been thought sound that statutes should be allowed to speak for themselves because normally people determine their rights and obligations, when they seek to determine them at all, by reading laws, or reading about them, and not by studying court decisions which may be under protracted review.

Appellee recognizes that the principle of strict construction of penal statutes is a flexible one. Appellee concedes

that the principle does not mean that a statute must be given its "narrowest possible meaning." *Singer* v. *United States*, 323 U. S. 338, 341-42. Appellee agrees that the intent of the Congress, so far as it is manifest, should be given effect in all statutes, penal or non-penal, and that common sense must be used in construing laws. *Roschen* v. *Ward*, 279 U. S. 337, 339.

Having joined with the Government in the generalities, however, there remains the more difficult problem of their application to the particular facts. The most significant fact is that there is no ambiguity in the words of section 8. *Cf. United States* v. *Gaskin*, 320 U. S. 527, 528-529. The necessary conclusion which follows from the meaning of the words is that a penalty is provided for landing or bringing in aliens but not for concealing or harboring them. Four district judges, including the court below, have so read the legislation, recognizing that acts described as misdemeanors would go unpunished until the legislature amended the law, but prompted by a higher regard for the proper limits of judicial action. Two district judges reached a contrary result on the assumption that the Congress had sought to treat concealing or harboring in the same manner as landing or bringing in, and on the theory that the assumed Congressional intention should be made to prevail over the language used. One circuit court sought a middle road which is here rejected by the Government presumably because there would appear to be no warrant for the suggested construction either in the words or history of the law, or in the nature of the offenses.

The governing consideration in the thinking of those courts which by construction have found a penalty in section 8 for concealing or harboring, has been their desire to carry out an assumed Congressional objective. But the facts show—facts which are not mentioned in the Government's brief and do not appear to have been brought to the

attention of any of the courts below—that the matter had been anticipated by the Commissioner General of Immigration; that he had made repeated recommendations to the Congress on the particular point; that the Congress considered his recommendations; that the Congress accepted certain of his recommendations but rejected others; and that the act of which Section 8 is a part was drawn with care and fully debated.

The Government thus actively sought from the Congress a law which covered the point here involved but failed to secure such a law. Thereafter it pressed for its construction before the lower courts, but failed to secure unanimity of opinion. When a circuit court decision was obtained only partially in its favor the Government opposed review here. After the Commissioner General concluded that an amendment for Section 8 was necessary, and after he had twice recommended such legislation in his annual reports, the Government returned to the Congress but failed to persuade it to act. Later the Government pressed for partially corrective legislation in a different area and managed to secure it. Now before this Court the Government repudiates its former position in the circuit court case (Government's brief, p. 13); vigorously contends that the interpretation of the court below is too strict and has been carried to absurd and unnatural lengths (Government's brief, p. 17), and concludes that there is "no doubt" regarding the Congressional intent to penalize concealing or harboring (Government's brief, p. 18).

G. Alternative Interpretations Urged by the Government

To the appellee the recorded facts suggest that the Government is seeking an amendment from the Court which thus far it has been unable to secure from the Congress.

That conclusion is strengthened by the choice of interpretations which the Government has offered the Court, any one of which, the Government apparently feels, would satisfy a Congressional intention repeatedly described as clear. There are three such interpretations:

Interpretation No. 1 would penalize the concealing or harboring of those aliens who had been unlawfully landed or brought into the country. This interpretation finds some support in the Senate Committee Reports commenting on section 8 ("such new provisions as are included are merely to complete the definition of the crime of smuggling aliens into the United States"). It is also the interpretation apparently supported by the Commissioner General of Immigration and the Department of Labor (*supra*, pp. 17-18). This interpretation is urged on pages 7, 9 and 11 of the Government's brief, and most clearly stated on page 11. In seeking to explain why in 1917 the Congress made no change in the disputed clause of Section 8, the Government there states that "Congress may have felt none was necessary since normally there can be no concealing or harboring of an alien until he has been 'landed' or 'brought in'." Under this interpretation, therefore, it would appear to be an essential element of the crime that the particular aliens concealed or harbored have been smuggled in, *i. e.*, unlawfully "landed" or "brought in." To conceal or harbor other aliens unlawfully in the country (*e. g.*, visitors who have overstayed their visas; seamen who have jumped ship, other aliens who have crossed the border unlawfully on their own initiative, etc.) would not be in violation of Section 8 (although in some circumstances perhaps unlawful now under other provisions).

Interpretation No. 2 is broader. This would penalize the concealing or harboring of any alien unlawfully in the country without regard to whether or not he happened to have been unlawfully landed or brought in. Under this

interpretation a person who aids an alien overstaying his visa would be punished with the full penalties applicable to smugglers. This interrpetation, as indicated above, finds no support in the legislative history. It is urged on pages 8, 10 and 18 of the Government's brief and most clearly stated on page 18. A proper reading of section 8 in the light of its legislative history, it is there said, leaves "no doubt of the Congress' intention that the penal provision should apply to the offense of concealing or harboring an alien not duly admitted or not lawfully entitled to enter or reside within the United States."

Interpretation No. 3 would distinguish between the offenses of landing or bringing in and concealing or harboring where several aliens are involved. In the case of landing or bringing in, because of the final clause of section 8; the power of the court in the imposition of sentence would be increased depending on the number of aliens brought in or landed at the same time. In the case of concealing or harboring, the power of the court to impose sentence would not be affected by the number of aliens. This is the interpretation proposed by the First Circuit in the *Medeiros* case, originally supported by the Government but now discarded by it with the statement that "while tenable, (it) is not consistent with the evident intent of congress. . . . ." Nevertheless, the Government seems prepared to accept the *Medeiros* construction if its other positions are rejected.

The impact of each of these interpretations on Evans would be markedly different. Under Interpretation No. 1 the decision below dismissing the indictment should be affirmed.[4] If it is an essential element of the crime that the

[4] Because of this fact it is not clear whether the Government has observed and urged this interpretation or has merely failed to distinguish between Interpretation No. 1 and Interpretation No. 2.

aliens have been "landed" or "brought in" those acts must be charged in the indictment and proved. They were not so charged (R. 1). Under Interpretation No. 2 Evans would be subject to a maximum penalty of 25 years imprisonment and a $10,000 fine. Under Interpretation No. 3 Evans would be subject to a maximum penalty of 5 years imprisonment and a $2,000 fine.

Holmes v. *United States*, 267 Fed. 529, certiorari denied, 254 U. S. 640, presented a somewhat comparable situation to the Court. Section of the Criminal Code (18 U. S. C. 87) provided that whoever stole or unlawfully sold military or naval property of the United States should be punished "as prescribed in the preceding section." Section 35, however, contained not one but two penalties; the first, a fine not exceeding $5,000, or imprisonment not exceeding 5 years or both, for false claims against the United States; the second, a fine of not more than $500 *and* imprisonment not exceeding 2 years for purchasing or receiving in pledge certain obligations from soldiers or sailors. Despite the Government's contention "that the lesser punishment must have been intended, because the subject-matter of the last portion of the section is germane to the subject treated of in section 36", the Fifth Circuit held that the statute was unenforceable. "In a criminal statute the citizen must not be left in uncertainty or to speculation or to argument as to what acts constitute a violation, or what punishment, if any, is visited upon a violation . . ." (267 Fed. 529 at 531.)

In Circular Letter No. 308, as early as 1912, Attorney General Wickersham had told the United States Attorneys of the country that unless corrective legislation was obtained, cases within the scope of section 36 should, where practicable, be prosecuted under other sections of the Code. (See *Smith* v. *United States* 145 F. 2d 643, certiorari denied 323 U. S. 803, for this background.) Some years later

corrective legislation was obtained. On September 10, 1942, Attorneys General Biddle addressed a letter to Senator Van Nuys, Chairman of the Senate Judiciary Committee, and asked that the law be corrected. The opening paragraph of the letter follows:

> "I desire to call your attention to a provision in section 36 of the Criminal Code (U. S. Code, title 18, sec. 87) which appears to give rise to doubt and uncertainty, as to the punishment prescribed for violations of that section, and which, in my 'opinion, should be made more definite and specific.'' (S. Rep. No. 505 on H. R. 1202, 78th Cong., 1st sess.)

The law was amended on November 22, 1943 (57 Stat. 591).

In this case, however, the Government not only asks the Court to amend the statute, despite its penal character and the clarity of the language used, but in the selection of penalties it offers the Court an extraordinarily wide choice of amendments. Appellee suggests that the determination of policy by way of amendment in the selection of one from among several competing and widely different penalty clauses cannot fairly be regarded as a judicial function.

Conclusion

It is respectfully submitted that the judgment of the court below should be affirmed.

January 1948.

DAVID GINSBURG.

SUPREME COURT OF THE UNITED STATES

No. 15.—October Term, 1947.

The United States of America, Appellant, *v.* Paul Evans.	Appeal from the District Court of the United States for the Southern District of California.

[March 15, 1948.]

Mr. Justice Rutledge delivered the opinion of the Court.

Section 8 of the Immigration Act of 1917 provides:

> "That any person . . . who shall bring into or land in the United States [or shall attempt to do so] or shall conceal or harbor, or attempt to conceal or harbor, or assist or abet another to conceal or harbor in any place . . . any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States under the terms of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $2,000 and by imprisonment for a term not exceeding five years, *for each and every alien so landed or brought in or attempted to be landed or brought in.*" (Emphasis added.) 39 Stat. 880, 8 U. S. C. § 144.

Appellee and another were indicted for concealing and harboring five named aliens in alleged violation of § 8. Before trial appellee moved that the indictment be dismissed on the ground that it did not charge a punishable offense. He argued that although the statute provided for two different crimes, one landing or bringing in unauthorized aliens, and the other concealing or harboring such aliens, punishment was prescribed in terms only for the former crime. The District Court accepted this argument and granted the motion to dismiss. The Government appealed directly to this Court pursuant to the Criminal Appeals Act, 28 U. S. C. § 345, and we noted probable jurisdiction.

The case presents an unusual and a difficult problem in statutory construction. It concerns not so much Congress' intention to make concealing or harboring criminal as it does the penalty to be applied to those offenses including attempts. The choice, as might appear on glancing at the statute, is not simply between no penalty, at the one extreme, and, at the other, fine plus imprisonment up to the specified maxima for each alien concealed or harbored. The problem is rather one of multiple choice, presenting at least three, and perhaps four, possible yet inconsistent answers on the statute's wording. Furthermore, as will appear, the legislative history is neither clear nor greatly helpful in ascertaining which of the possibilities calling for punishment was the one Congress contemplated.

Before discussing specifically the alternatives, we note that the Government rests primarily on the clarity with which § 8 indicates Congress' purpose to make concealing or harboring criminal, rather than upon any like indication of legislative intent concerning the penalty.[1] Because the purpose to proscribe the conduct is clear, it is said, we should not allow that purpose to fail because of ambiguity concerning the penalty. Rather we are asked to make it effective by applying that one of the possibilities which seems most nearly to accord with the criminal proscription and the terms of the penalizing provision.

On the other hand, appellee does not really dispute that Congress meant, by inserting the amendment prohibiting concealing or harboring,[2] to make those acts criminal.

[1] Since the issues arise on dismissal of the indictment which charges both concealing and harboring, as well as attempts to conceal and harbor, we are not asked to determine whether "conceal or harbor" as used in § 8 specifies only one offense or two distinct ones or, if the latter, the difference between the two. Cf. notes 7 and 8 *infra* and text.

[2] Section 8 as enacted originally in 1907, 34 Stat. 900, covered only bringing in or landing and attempts to bring in or land. The

But he denies that it is possible, either from the section's wording or from the legislative history, to ascertain with any fair degree of assurance which one of the possible penal consequences Congress may have had in mind. From this he falls back upon the conclusion indicated by the premise, namely, that the task of resolving the difficulty goes beyond dispelling ambiguity in the usual sense of judicially construing statutes [3] and, if attempted, would require this Court to invade the legislative function and, in effect, fix the penalty. The argument is therefore not merely that a rule of strict construction should be applied in petitioner's favor. It is rather that the choice the Government asks us to make is so broad and so deep, resting among such equally tenable though inconsistent possibilities, that we have no business to make it at all.

Even in criminal matters a strong case would be required to bring about the result appellee seeks. For, where Congress has exhibited clearly the purpose to proscribe conduct within its power to make criminal and has not altogether omitted provision for penalty, every reasonable presumption attaches to the proscription to require the courts to make it effective in accord with the evident purpose. This is as true of penalty provisions as it is of others. *United States* v. *Brown*, 333 U. S. 18.

But strong as the presumption of validity may be, there are limits beyond which we cannot go in finding what Congress has not put into so many words or in making certain what it has left undefined or too vague for reason-

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prohibition of concealing or harboring and of attempting to conceal or harbor was added by amendment in 1917. 39 Stat. 880.

[3] Indeed appellee asserts that the words of § 8 are unambiguously to the effect that fine and imprisonment are to be imposed "for each and every alien so landed or brought in . . . ," not "for each and every alien so concealed or harbored." This view regards the concluding "for each and every alien" clause as an integral and inseparable part of the penalty provision for all offenses punishable under the section.

able assurance of its meaning. In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions.[4] But given some legislative edict, the margin between the necessary and proper judicial function of construing statutes and that of filling gaps so large that doing so becomes essentially legislative, is necessarily one of degree.

We turn then to consider whether the Government is asking that we do too much when it puts forward a preferred reading of the penal provision, perhaps suggests another as a permissible alternative, and is prepared to accept a third, though disavowing its complete consistency with Congress' intent, if neither of the others is adopted.

The Government's preferred reading would impose the same penalty for concealing or harboring as for bringing in or landing, notwithstanding the "for each and every alien" clause is limited expressly to aliens "so landed or brought in or attempted to be landed or brought in." Under this interpretation the effect of that clause would be to provide additional punishment, as stated in the brief, "where the crime of landing or bringing in aliens *or the crime of concealing or harboring aliens* involves more than one alien brought into the country illegally." (Emphasis added.)

This construction is admittedly ungrammatical and the failure to integrate the wording of the "each and every alien" clause with the language of the 1917 amendment adding the concealing and harboring offenses is conceded to have been possibly due to oversight.

If only imperfect grammar stood in the way the construction might be accepted. But we agree with appellee that more is involved. The Government in effect con-

[4] *United States* v. *Hudson and Goodwin*, 7 Cranch 32; *United States* v. *Britton*, 108 U. S. 199; *United States* v. *Eaton*, 144 U. S. 677; *Viereck* v. *United States*, 318 U. S. 236, 241, 243-244.

cedes that in terms the section prescribes no penalty for concealing or harboring. But it argues that inclusion of them as offenses becomes meaningless unless the penalty provision, in spite of its wording, is construed to apply to them as well as to bringing in or landing. In other words, because Congress intended to authorize punishment, but failed to do so, probably as a result of oversight, we should plug the hole in the statute.

To do this would be to go very far indeed, upon the sheer wording of the section. For it would mean in effect that we would add to the concluding clause the words which the Government's reading inserts, "and for each and every alien so concealed or harbored." It is possible that Congress may have intended this. But for more than one reason we cannot be sure of that fact.

In the first place, the section as originally enacted was limited to acts of smuggling. And there is some evidence in the legislative history that the addition of concealing or harboring was meant to be limited to those acts only when closely connected with bringing in or landing, so as to make a chain of offenses consisting of successive stages in the smuggling process.[5]

But that evidence is not conclusive.[6] And the section's wording is susceptible of much broader constructions. On the language it is possible not only to treat concealing or harboring as offenses distinct and disconnected from smuggling operations; it is also possible to regard them as separate and distinct from each other. And on the

[5] The Senate Report accompanying the 1917 amendment stated that "such new provisions as are included are merely to complete the definition of the crime of smuggling aliens into the United States and related offenses . . . ." Sen. Rep. No. 352, 64th Cong., 1st Sess. 9.

[6] There is no indication of the degree or character of the relation suggested by the words "and related offenses," see the preceding note, with reference to the proximity of the acts proscribed, in time and place, to smuggling operations.

broadest possible interpretation, giving independent effect to the words "or not lawfully entitled . . . to reside within the United States,"[1] the section could be taken to apply to concealing or harboring of aliens lawfully admitted but unlawfully remaining within the country.

In that event an innkeeper furnishing lodging to an alien lawfully coming in but unlawfully overstaying his visa would be guilty of harboring, if he knew of the illegal remaining. And, with him, one harboring an alien known to have entered illegally at some earlier, even remote, time would incur the penalties provided for smuggling, if the Government's position giving implied extension of the penalty provision were accepted.

We do not mention these possibilities to intimate opinion concerning the reach of the statute with reference to covering them, for no such question is squarely before us. But we point them out because they are relevant to the problem of assurance or reasonable certainty in asserting that Congress by necessary implication intended to extend the penalties originally and still clearly provided for smuggling to all offenses covered by the language defining the crimes.

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[1] This possibility apparently is not comprehended by the indictment in this case, which substitutes "and" for the "or" given by the statutory wording in describing the aliens charged to have been concealed and harbored, *viz.*: "which said alien persons then and there were aliens not duly admitted to the United States by an immigrant inspector *and* not lawfully entitled to enter or reside in the United States . . . ." (Emphasis added.)

Even if this use of the conjunctive in place of the statutory disjunctive, see text of § 8 quoted at the beginning of this opinion, would prevent applying this indictment to a case involving no illegal entry, but only illegal remaining, that fact would not prevent the drafting of other indictments to cover such cases or perhaps amending this one to give it the disjunctive effect. These possibilities are as pertinent to whether the suggested penal extension should be made as if actually presented on the indictment in its present form.

The very real doubt and ambiguity concerning the scope of the acts forbidden, if any, beyond those clearly and proximately connected with smuggling raise equal or greater doubt that Congress meant to encompass all those acts within the penal provisions for smuggling. If acts disconnected from that process are forbidden, the separate offenses of concealing and more particularly of harboring, if the two are distinct, might require, in any sound legislative judgment, very different penalties from those designed to prevent or discourage smuggling in its various phases. That is essentially the sort of judgment legislatures rather than courts should make.

The position the Government asks us to take involves therefore a major task in two respects, not merely one. The first is to expand the penal language beyond the explicit limitation "for each and every alien so landed or brought in," so as to apply the penalties designed for smuggling to all offenses covered by the section. The second is to do this blindly in reference to the scope and quality of the forbidden acts to which the extension is to be made, that is, without resolving beforehand the questions we have noted as arising on the face of the section in relation to its reach in defining the offenses of concealing or harboring. The Government does not ask us to undertake now to say how far the section may or may not go in these numerous aspects of defining coverage.[8] We are not willing to undertake extension of the penalty provision blindfold, without knowing in advance to what acts the

[8] The indictment not only conjoins illegal remaining with illegal entry, cf. note 7, but charges that petitioner concealed and harbored aliens "not duly admitted . . . and not lawfully entitled to enter or reside . . . ." Thus, the specific charge in this case cannot be said to be limited to smuggling, for no wording of the statute relating to bringing in or landing is included. Such a limitation could be read into the indictment only by now declaring the statute to be limited as a whole to acts constituting part of the smuggling process.

penalties may be applied. Nor are we any more willing to decide wholesale among the various possibilities of coverage. That problem, squarely presented in concrete instances, might be resolved step by step, were there no difficulty over the penalty. But to resolve it broadside now for all cases the section may cover, on this indirect presentation, would be to proceed in an essentially legislative manner for the definition and specification of the criminal acts, in order to make a judicial determination of the scope and character of the penalty.

Beyond the difficulties arising on the section's wording, the legislative history is sufficent in one respect, when added to the other obstacles, to make them insuperable for accepting the Government's preferred reading. It discloses that both before [9] and after [10] the 1917 amend-

[9] The bills proposed by the Commissioner General would have clearly prescribed the same penalty for concealing or harboring as for landing or bringing in. The penalty provision of one draft stated that the penalty should apply "for each and every alien so landed or brought in or attempted to be landed or brought in, or so concealed or harbored, or with respect to whom there has been such an attempt to conceal or harbor, or assisting or abetting another to conceal or harbor." See Annual Report for 1909 of the Commissioner General of Immigration, 168. The simple clause "for each and every alien to whom this section is applicable" was substituted in the bill proposed in the annual report for 1910. (P. 170.) In 1911 a bill incorporating many of the Commissioner General's suggested amendments to the Act was introduced, but the penalty provisions of § 8 were not made applicable to concealing or harboring. S. 3175, 62d Cong., 2d Sess. This omission was not corrected in the subsequent drafts that eventually resulted in the 1917 statute. See H. R. 6060, 63d Cong., 2d Sess.; H. R. 10384, 64th Cong., 1st Sess.

[10] In his 1931 and 1932 annual reports the Commissioner General specifically pointed out that an amendment to § 8 was necessary because it had been interpreted to provide no penalty for the offense of concealing and harboring. A bill introduced in the House of Representatives in 1934, but not enacted, included an amendment

ment the immigration authorities and particularly the Commissioner General repeatedly sought from Congress the specific penal wording the Government now asks us to insert. These efforts were made as conflicting judicial decisions demonstrated that the courts were very much at sea [11] and their floundering was brought to congressional attention.[12] In each instance nevertheless the effort was unsuccessful.

It may well be, as the Government infers, that this only increases the mystery of Congress' failure to include ex-

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to § 8 to make the penalty apply "for each and every alien in respect to whom any of the foregoing offenses have occurred." H. R. 9366, 73d Cong., 2d Sess. At the hearings on this bill, the Deputy Commissioner expressly pointed out that the amendment was designed "to make sure that there will be no question that we can inflict this penalty for concealing a smuggled alien." Hearings before the House Committee on Immigration and Naturalization on H. R. 9366, 73d Cong., 2d Sess. 22.

In 1940 the general problem was again before Congress when it was made unlawful to stow away in order to facilitate entry into the United States or to aid or abet a stowaway, 54 Stat. 306, and again when the Act was amended to authorize the deportation of any alien who, knowingly and for gain, encouraged, induced or assisted another alien to effect an unlawful entry. 54 Stat. 671.

[11] The Circuit Court of Appeals for the First Circuit construes the section to prescribe a penalty for concealing or harboring, but not to authorize increased penalties where more than one alien is concerned, as is the case for the offense of landing or bringing in. *Medeiros* v. *Keville*, 63 F. 2d 187, see note 14 *infra*. In the Southern District of California it has been held both that no penalty is prescribed for concealing or harboring, *United States* v. *Niroku Komai*, 286 F. 450; *United States* v. *Kinzo Ichiki*, 43 F. 2d 1007, and that the same penalty is prescribed for concealing or harboring as for landing or bringing in, *United States* v. *Roberts*, unreported decision by Yankwich, J., on April 29, 1946; *United States* v. *Piamonte*, unreported decision by Weinberger, J., on May 21, 1946.

[12] See hearings before the House Committee on Immigration and Naturalization on H. R. 9366, 73d Cong., 2d Sess. 22.

plicit penalties when it added the new offenses. It is possible that Congress may have thought none were needed. But that view hardly explains satisfactorily the subsequent repeated failures to clarify the matter, after experience had shown that need. We cannot take them as importing clear direction to the courts to do what Congress itself either refused or failed on notice to do upon so many occasions and importunities.

We are not entirely sure that the Government intends to put forward as an alternative suggestion the reading, already discussed, which would extend the smuggling penalties to the section's broadest possible construction in relation to definition and coverage of criminal acts, *i. e.*, to concealing or harboring of aliens lawfully admitted but unlawfully remaining. But appellee regards this as a tendered possibility and specified statements in the Government's brief appear to sustain his view.[13] Whether appellee is correct in taking the statements as suggesting an independent alternative or, on the other hand, they were made, though not accurately phrased for the purpose, in support of the Government's preferred position, is not greatly material. For, in any event, what has been said about extending the penalty to include the narrower range of forbidden acts applies to the broader one with even greater force as calling for the extension's rejection.

There is, finally, the third possible interpretation which the Government concedes not wholly consistent with the statutory purpose, but says nevertheless is clearly authorized "if a strictly grammatical construction of Section 8

[13] Illustrative is the statement, "We submit, therefore, that a proper reading of Section 8 in the light of the legislative history can leave no doubt of Congress' intention that the penal provisions should apply to the offense of concealing or harboring an alien *not duly admitted or not lawfully entitled to enter or reside within* the United States." (Emphasis added.)

is employed." This would read the "for each and every alien" clause out of the section insofar as offenses of concealing or harboring are concerned, while leaving it effective for bringing in or landing. In other words, the reading would differentiate the two classes of offenses for applying the penalty provision. The prescribed maximum penalties would be made effective for concealing or harboring, but without augmenting them according to the number of aliens concealed or harbored, even though previously landed or brought in, at the same time. That increase however would continue in force for bringing in or landing.[14]

The wording of § 8 can be made to support this interpretation only by treating the "for each and every alien" clause as ambivalently separable in relation to the two classes of offenses. Nothing on the face of the section suggests such a reading. The comma preceding the final clause is not equal to the burden of supporting the construction. The clause was part of the section before the concealing and harboring offenses were added. Previously there could have been no possible intent or purpose to apply the clause to some of the offenses but not to others. The clause's function was solely to augment the penalty when more than one alien was involved. That

[14] This was the view taken in *Medeiros* v. *Keville*, 63 F. 2d 187, by the Circuit Court of Appeals for the First Circuit, which appears to be the only appellate decision on the matter. The Government successfully opposed the granting of certiorari in that case, although consistently with its present preferred position it now asserts that, contrary to the ruling, the congressional intent to punish concealing and harboring proportionately to the number of aliens involved is "equally as clear as the intent to make those offenses punishable at all."

In response to petitioner's suggestion of inconsistency between that position and the one now taken, the Government points out that its brief in opposition also urged that the *Medeiros* decision was, in any event, correct on other grounds.

function was not changed when the new offenses were added.[15] Neither the amendment's wording nor its history evinces any purpose to increase punishment, proportionately to the number of aliens involved, for one class of offenders but not for the other. The construction, like the preferred one, is a construction of necessity, to be justified if at all only by the fact that without it the statute becomes unenforceable for the offenses of concealing or harboring.

If there were less inconsistency among the tentative possibilities put forward or greater consistency with the section's wording implicit in one, resolution of the difficulty by judicial action would involve a less wide departure from the common function of judicial interpretation of statutes than is actually required by this case. But here the task is too large. With both of the parties we agree that Congress meant to make criminal and to punish acts of concealing or harboring. But we do not know, we can only guess with too large a degree of uncertainty, which one of the several possible constructions Congress thought to apply. The uncertainty extends not only to the inconsistent penalties said to satisfy the section, either grammatically or substantively if not grammatically. It also includes within varying ranges at least possible, and we think substantial, doubt over the section's reach to bring in very different acts which conceivably might be held to be concealing or harboring. The latter ambiguity affects the former and their sum

[15] Indeed it was in effect reinforced by the 1917 amendment. For that amendment not only added the new offenses but substantially increased the maxima of the authorized fine and imprisonment. Congress thus gave specific attention to the penal provision in addition to expanding the criminal acts, and in this respect followed the Commissioner General's recommendation. Yet it declined at the same time to alter the "for each and every alien" clause, which he also asked to have changed.

makes a task for us which at best could be only guesswork.

This is a task outside the bounds of judicial interpretation. It is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make. That task it can do with precision. We could do no more than make speculation law.

The judgment is

Affirmed.